RECENT EXERCISE OF FEDERAL POWER UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION.

IT IS somewhat singular that, although the desirability of a just regulation of interstate and foreign commerce was one of the most influential causes which led to the adoption of the Constitution,[1] more than thirty-five years elapsed before the Supreme Court of the United States was called upon to define and construe the power given Congress "to regulate Commerce with foreign Nations and among the several States and with the Indian Tribes." It is even more remarkable that this first decision[2] laid down all of the fundamental principles as to the relative powers of the state and national governments which have since been applied in the many cases which have been before the courts involving the commerce clause of the Constitution. The Supreme Court has itself admitted that its opinions have been far from harmonious, and are sometimes difficult, if not impossible, to reconcile.[3] It has always recognized, however, that the opinion in Gibbons *v.* Ogden is the guide to be followed.

Thus it was said in Kidd *v.* Pierson;[4] "The line which separates the province of federal authority over the regulation of commerce from the powers reserved to the States has engaged the attention of this court in a great number and variety of cases. The decisions in these cases, though they do not in a single instance assume to trace that line throughout its entire extent, or to state any rule further than to locate the line in each particular case as it arises, have almost uniformly adhered to the fundamental principles which Chief Justice Marshall, in the case of Gibbons *v.* Ogden,[5] laid down as to the nature and extent of

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[1] Brown *v.* Maryland, 12 Wheat. 419; Bowman *v.* Chicago, etc., Ry. Co., 125 U. S. 465.

[2] Gibbons *v.* Ogden, 9 Wheat. 1.

[3] Fargo *v.* Michigan, 121 U. S. 230.

[4] 128 U. S. 16.

[5] 9 Wheat. 1.

the grant of power to Congress on this subject, and also of the limitations, express and implied, which it imposes upon state legislation with regard to taxation, to the control of domestic commerce, and to all persons and things within its limits, of purely internal concern. According to the theory of that great opinion, the supreme authority in this country is divided between the government of the United States, whose action extends over the whole Union, but which possesses only certain powers enumerated in its written Constitution, and the separate governments of the several States, which retain all powers not delegated to the Union. The power expressly conferred upon Congress to regulate commerce is absolute and complete in itself, with no limitations other than are prescribed in the Constitution; is to a certain extent exclusively vested in Congress, so far free from state action; is co-extensive with the subject on which it acts, and cannot stop at the external boundary of a State, but must enter into the interior of every State whenever required by the interests of commerce with foreign nations, or among the several States."

While the plenary power of the national government to control commerce among the states was thus early recognized, it was not until a comparatively recent date that Congress saw fit to exercise this power by direct legislation to any considerable extent.

The states, however, from the beginning, in the control of their internal commerce and the regulation of their domestic affairs, by statutory enactment and otherwise, have trespassed, more or less, upon the exclusive power of the national government to control interstate commerce; and nearly all of the earlier decisions have turned, therefore, not upon what the federal government might do, but what the states might not do.

Of course, it was frequently necessary, in order to define the limitations of state power, to determine in a general way the rights of the federal government.

The mere existence of the power to control commerce among the states, which was established in Gibbons *v.* Ogden as plenary, paramount and exclusive, was in itself, in a negative way, an effective regulation of that commerce in that it was thus left

free to move unvexed and unburdened by state control or regulation; and the evil of discriminatory and retaliatory statutes, which might otherwise have been enacted by the several states in the interest of their own citizens, was thus avoided.

In the recent "Minnesota Rate Case," decided July 9, 1913, and not yet reported, it was pointed out that the grant in the constitution of its own force, that is, without action by Congress, only established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority.

The court cited a large number of its prior decisions, in which it was declared that, as to those subjects which require a general system of uniformity of regulation, the power of Congress is exclusive, but that in other matters admitting of diversity of treatment, according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act, and when Congress does act, the exercise of its authority over-rides all conflicting state legislation.

Failure, therefore, by Congress until recently to enact legislation for the purpose of exercising its control over interstate commerce has had the effect of leaving it within the power of the states indirectly to affect that commerce in many important particulars. Indeed, it is rather an anomaly that when Congress acts under the commerce clause of the Constitution, it frequently nullifies state statutes and regulations which have no direct relation to the subject of the Congressional legislation. Several illustrations of this indirect and far-reaching effect of federal legislation as to commerce will be given in another portion of this article.

When it is said that Congress has only recently exercised its power to legislate with regard to interstate commerce, that which moves by land is meant, for at an early period the national government assumed exclusive control of the navigable waters within its jurisdiction and of the commerce they bore. It enacted various statutes looking to the safety of passengers,

freight and crews, and of the vessels themselves. Thus, it required that masters, engineers and pilots should be examined as to their efficiency before receiving licenses; boiler inspections were provided for, life preservers were required to be carried, and the whole subject of commerce by water was dealt with. As late as 1894 Judge Brewer, in the Debbs Case,[6] called attention to the fact that, while the jurisdiction of Congress to regulate commerce had theretofore been exercised chiefly over water navigation, the same power existed as to railroads and all other instrumentalities of commerce.

It is not within the scope, and, of course, would not be possible within the limits, of this article to undertake to define the line of demarcation between state and federal control of commerce, or to consider how far either sovereignty can go within its proper sphere. Its purpose is briefly to refer to the more important of the statutes by which the national power has been exercised and to some of the decisions of the Supreme Court applying and construing them, to show how far Congress has already gone, how rapidly the exercise of its powers has grown, and of what recent origin this statutory exercise of the power of the national government is.

In Fargo *v.* Michigan[7] Judge Miller, after referring to the fact that most of the decisions construing the commerce clause had theretofore arisen from attempts by the states to impose burdens on interstate commerce by statutes which endeavored to regulate its exercise, either as to the mode by which it should be conducted or by the imposition of taxes upon the articles of commerce, or the transportation of those articles, said: "The recent act, approved February 4, 1887, entitled 'An Act to Regulate Commerce,' passed after many years of effort in that body, is evidence that Congress has at last undertaken a duty imposed upon it by the Constitution of the United States in the declaration that it shall have power 'to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.' Congress has freely exercised this power so far as re-

[6] 158 U. S. 564.

[7] 121 U. S. 239.

lates to commerce with foreign nations and with the Indian tribes, but in regard to commerce among the several states it has, until this act, refrained from the passage of any very important regulation upon this subject, except perhaps the statutes regulating steamboats and their occupation upon the navigable waters of the country."

The act referred to, which is commonly known as the "Interstate Commerce Act," was in its general terms somewhat similar to the existing English "Companies Act;" and its chief objects, as stated by the Supreme Court in Interstate Commerce Commission *v.* B. & O. R. Co.,[8] "were to secure just and reasonable charges for transportation, to prohibit unjust discriminations in the rendition of like service under similar circumstances and conditions, to prevent undue or unreasonable preferences to persons, corporations or localities, to inhibit greater compensation for a shorter than for a longer distance over the same line, and to abolish combinations for the pooling of freight."

The quasi judicial body known as The Interstate Commerce Commission, which was created to carry out the provisions of the act, was given powers which then seemed broad and almost revolutionary, but which in the light of subsequent amendatory legislation and judicial utterances, appear narrow indeed. It was early held that the Commission could not act of its own initiative to correct abuses of a general character, but must await the presentation of a concrete case and a definite injury, and that it could not make general orders for the control of carriers subject to its jurisdiction, which should have the effect of rules of action to be observed by them.[9]

When a specific rate was complained of it could determine its reasonableness, and when discrimination was charged it could decide whether it existed. It could not, however, adjudge in advance what rate would be reasonable or adopt general rules to prevent discrimination. Its powers were thus negative; it could decide what constituted abuses, but could only, in a very

[8] 145 U. S. 263.

[9] Texas, etc., Ry. Co. *v.* Interstate Commerce Commission, 162 U. S. 197.

limited way, prescribe rules to forestall them. It could not make or establish rates, its powers in this regard being wholly supervisory and restricted to the determination of whether an existing rate was reasonable.[10]

Recent amendments to the Interstate Commerce Act, however, have conferred upon the Commission the right, with some restrictions, to make rates. Thus, railroads cannot change existing rates without its approval and consent, which may be denied of its own initiative without complaint made, although it cannot withhold its approval capriciously or arbitrarily.[11] When a given rate has, on the hearing of a complaint, been held unreasonable it can prescribe what it considers a reasonable rate. As to joint rates to be charged for through shipments, apportioned between two or more carriers, the Commission can, on complaint, or of its own initiative, establish joint routes and classifications, make and enforce maximum rates and prescribe their division between the several carriers.[12]

A greater and broader power than that given the Interstate Commerce Commission, as to rates, could hardly be conferred, nor could a more difficult task be imposed, for the making of rates is one of the most complex and involved features of the intricate art of railroad operation. Again, the Commission has now the power, which it freely exercises, to make general rules and regulations of the most radical and far-reaching consequence and importance, which must be observed by the railroads in the conduct of their affairs. It thus appears that the direct control which Congress now exercises over interstate commerce is of a very different character from that which it at first ventured upon. The relatively narrow scope of the original Interstate Commerce Act is well illustrated in the case of Cincinnati, etc., R. Co. *v.* Interstate Commerce Commission,[13] where it was said that "subject to the two leading prohibitions that

[10] Interstate Commerce Commission *v.* Cincinnati, etc., R. Co., 167 U. S. 479.

[11] Interstate Commerce Commission *v.* Louisville & Nashville R. Co., 227 U. S. 88.

[12] 36 Stat. at L. 562.

[13] 162 U. S. 184.

their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates, so as to meet the interests of commerce, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits." It would be hard to persuade a railroad management of today that the present legislation leaves much freedom of control in its hands. Not only is the price at which it must sell the commodity in which it deals to a great extent fixed and determined by an outside agency, but the manner in which it conducts the business of furnishing transportation is largely prescribed and controlled by the federal statutes and the regulations of the Commission.

As showing the great strides which have been taken in recent years in the direction of federal control of railroads, it is interesting to observe that until a very recent period it has never been claimed that Congress had any power over intrastate rates, it being always conceded that they were subject alone to state control. In the recent "Minnesota Rate Case," supra, a very strong intimation, however, was thrown out that by appropriate legislation the national government could largely control intrastate rates. Certain acts and orders of the Minnesota authorities, which prescribed rates for goods moving solely within the state, were complained of upon the ground that their inevitable effect was to impose a direct burden upon interstate commerce and to create unjust discriminations between localities in Minnesota and those in adjoining states, it being contended that the rates, therefore, were unenforcible because repugnant to the commerce clause and to the action of Congress theretofore taken thereunder. The Circuit Court of Appeals acquiesced in this contention and held the intrastate rates illegal. The Supreme Court on appeal reversed this holding, but was careful to base its decision, not upon the ground that the national government had no authority over intrastate rates which might prove a burden upon inter-

state commerce, but that such power had not been exercised by Congress. It held that the states continue to possess the right to prescribe reasonable rates for the exclusively internal traffic of interstate carriers since the passage of the Interstate Commerce Act, although it may be that, by reason of the inter-blending of their interstate and intrastate operations, adequate regulation of interstate rates cannot be maintained without imposing requirements with respect to other intrastate rates which substantially affect the former.

This ruling, however, was based solely upon Congressional inaction and not upon the absence of national power. What may be the ultimate consequence of this suggestion, which was repeated in the Missouri rate case, which was decided June 16th last and has not yet been reported, no one can foresee.

While the Interstate Commerce Commission, under existing legislation, necessarily confines its activities chiefly to the supervision of rates, the prevention of discriminations and the prescribing of rules to effectuate these ends, Congress undoubtedly has power to confer upon it jurisdiction similar to that now exercised by the various state commissions; and, should it do so, the paramount power of the national government is such that the state commissions will lose much of their importance. For instance, depots, bridges, tracks, cars, locomotives and other equipment are just as much instrumentalities of interstate as of intrastate commerce, and their supervision and control can as well be committed to the national as to the state authorities. Indeed, Congress has already manifested a tendency to legislate in this direction.

At present the Interstate Commerce Commission is undertaking the valuation of the physical property of all of the railroads, to arrive at a proper basis for rate-making and to determine the correct ratio between its actual value and the securities which have been issued thereon. There can be little doubt that in the near future the Commission will be empowered to regulate and control the issuance by railroads engaged in interstate commerce, of stocks, bonds and other corporate securities.

What has been said relates to the Interstate Commerce Act

as a direct and affirmative exercise of power by the federal government itself. Aside from this, however, it has had a most important incidental effect in limiting the power heretofore exercised by the states indirectly to regulate and control matters connected with interstate commerce. The limits of this article permit of only a few illustrations as to this. In Chicago, etc., Ry. Co. *v.* Hardwick Co.[14] it was held that by the Hepburn Act, amending the original Interstate Commerce Act, Congress has so taken possession of the subject of the delivery when called for of railroad cars to be used in interstate traffic, that the Minnesota statute, requiring railroad companies to furnish them on demand and imposing a so-called demurrage charge or penalty for each day's delay in so doing, is invalid, although, if Congress had not acted, it would have been within the power of the state to make such a regulation. In St. Louis, etc., R. Co. *v.* Edwards[15] a statute of the State of Arkansas, imposing a demurrage charge or penalty upon a carrier for failing promptly to notify a consignee of the arrival of a shipment at destination, was held invalid because the entire subject of the delivery of interstate shipments has been dealt with by Congress in the act to regulate commerce. In Mo., etc., R. Co. *v.* Harriman Brothers[16] it was held that the Carmack amendment furnished an exclusive rule on the subject of the liability of carriers under contracts for interstate shipments, so that state laws or policies involving contracts limiting the liability of carriers for loss or damage to the agreed or declared value upon which the rate was based, are nullified. In none of these cases was the subject-matter of the state statutes directly covered by the federal act, but, because legislation as to the general subject had been enacted by Congress, the states were held to have lost their power in the premises. Many other illustrations might be given to show how, as the national legislative control over interstate commerce increases, the power of the states to a corresponding degree decreases.

Not only does the Interstate Commerce Act supersede and invalidate much state legislation, but in many instances it in-

[14] 226 U. S. 426.
[15] 227 U. S. 265.
[16] 227 U. S. 657.

vades and disregards the sanctity of private contract obligation. Thus, it has been held that, where a carrier makes a lawful contract with a shipper to transport his goods at an existing rate which has been published and filed as required by law and thereafter, pending the execution of the contract, fixes and files a different rate, the contract is unenforcible.[17]

Again, it has been decided that, when a carrier and a shipper execute a contract for transportation at what they both in good faith believe to be the prevailing rate, the shipper must refund any difference between the tariff charged and that filed with the Commission, even though he has based the selling price of his goods on the freight rate quoted him.[18] These rulings are intended to make rebates and discriminations impossible.

The next important exercise by Congress of its power over interstate commerce was the passage of the act of July 2, 1890, known as the Sherman Law, which was aimed at the suppression of monopolies. It was conceded that the power to prohibit trusts, combinations and monopolies by direct legislation was reserved to the states, and that the national government could only deal therewith through the exercise of some other power conferred upon it, and the Sherman Law was enacted under the power over commerce. It was upheld upon the theory that monopolies, in so far as they concern the subjects or instrumentalities of interstate commerce, have the effect of restraining and burdening it, and that it is, therefore, within the power of the national government to legislate against them in the interest of free and unrestricted commerce among the states. The act was held constitutional in Addyston Pipe & Steel Co. *v.* United States[19] and has since been applied in numerous cases. It was argued in that case that the reason for vesting in Congress the power to regulate commerce was to insure uniformity of regulation against discriminating state legislation, and that the national power was limited to the protection of interstate commerce from acts of interference by state legislation or regulation, and that it includes Congressional power over common carriers,

[17] Armour Packing Co. *v.* United States, 209 U. S. 56.
[18] Texas Pac. R. Co. *v.* Mugg, 202 U. S. 242.
[19] 175 U. S. 211.

elevator, gas and water companies, for reasons peculiar to such carriers and companies, but not the general power to interfere with or prohibit contracts between citizens, even though they have interstate commerce for their object and result in a direct and substantial obstruction to or regulation thereof. The court, however, utterly repudiated this suggestion and held that the paramount and exclusive power of Congress over interstate commerce authorized it thus to legislate against monopolies.

The extent of the power of the national government over trusts and combines cannot be here discussed. It is sufficient to say that so important is this exercise of federal power that much of the time of the Supreme Court of the United States at its last term was devoted to cases arising under the Sherman Law. The Standard Oil case,[20] the Tobacco Trust case,[21] and the Union Pacific case[22] are so fresh in the public mind that it is unnecessary to do more than refer to them.

So far-reaching is the power of the federal government over trusts and combines because of its right to control interstate commerce, that the stock of the Southern Pacific Railroad, which the Union Pacific Railroad was denied the right to hold, is now being parceled out or distributed under the incidental power of the courts to effectuate their decision that its ownership was unlawful.

It was at first doubted whether the Sherman Law applied to railroads, it being contended that it covered the subjects but not the instrumentalities of commerce, but in the Trans-Missouri Freight Association case[23] it was held to include railroads.

Inasmuch as no transportation, manufacturing or trading organization can attain to any considerable magnitude without engaging in interstate commerce, it is easily seen how far-reaching is the control of the national government over them and their affairs under this statute.

While the Sherman Law and the original Interstate Commerce Act were passed some years ago, they have derived their virility and importance in large measure from subsequent legis-

[20] 225 U. S. 1.
[21] 221 U. S. 106.
[22] 226 U. S. 61.
[23] 166 U. S. 290.

lative amendment, judicial construction and executive action, and each may fairly be treated as a recent exercise of federal control over commerce.

The act of February 14, 1903,[24] which created a Bureau of Corporations and vested it with power to make "diligent investigation into the organization, conduct and management of the business of any corporation, joint stock company, or corporate combination engaged in commerce among the states," for the purpose of securing data as to its business and making recommendations for appropriate legislation or executive action, marks another radical extension of the national power in the same direction.

The Safety Appliance Act[25] of March 2, 1893, as amended by the act[26] of March 2, 1903, which requires that cars and locomotives engaged in interstate commerce shall be equipped with certain designated apparatus, is important in itself and because of the opportunity which has been afforded in its application for the Supreme Court to take advanced ground as to what constitutes interstate commerce. In the recent case of Southern Railway Co. *v.* United States[27] it was held that where a freight train was made up of cars, some of which were destined for intrastate and others for interstate points, the entire train was an instrumentality of interstate commerce; so that the intrastate as well as the interstate cars must be equipped with the prescribed safety appliances. Thus, where only one car out of fifty is directly engaged in interstate commerce, its presence in the train has the effect of impressing all of the other cars with the character of instrumentalities of commerce among the states. It will readily be seen that under this decision but few trains, whether for the transportation of freight or passengers, are not engaged in interstate commerce. This case again illustrates the paramount nature of the national power over everything bearing directly or indirectly on interstate commerce.

The tendency manifested by this legislation is also significant. It would seem quite as proper for Congress to prescribe the

[24] 32 Stat. at L. 827.
[25] 27 Stat. at L. 531.
[26] 32 Stat. at L. 943.
[27] 222 U. S. 20.

exact character of equipment to be used in passenger and freight traffic, and to go even further and require that the road-bed, bridges and other structures be kept in a safe condition. These things are now the subject of state regulation, but it can hardly be doubted that sooner or later the national government will undertake their control and supervision.

A somewhat similar exercise of Congressional power is found in the act of March 4, 1907,[28] commonly called the "Hours of Service Act," by which Congress has undertaken to prohibit certain train men from performing continuous service beyond what it deemed a proper limit of time. This statute was upheld in the case of Baltimore & Ohio R. Co. *v.* Interstate Commerce Commission [29] upon the ground that, by virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safe-guarding of the persons and property that are transported in that commerce and of those who are employed in transporting them. It was said that the length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends, and that in imposing restrictions having reasonable relation to this end there was no interference with liberty of contract as guaranteed by the Constitution.

In Northern Pacific R. Co. *v.* State of Washington [30] the Supreme Court held that by this statute Congress had so acted upon the subject of the hours of labor of interstate railway employees as to preclude a state during the period between the date of the act and the time when by its express terms it should go into effect from making or enforcing as to such employees a local regulation limiting hours of labor. It has also been held that the fact that an employee is engaged in intrastate as well as interstate commerce does not prevent the application of the act.

Inasmuch as Congress is held to have full power over everything which can affect the safety or efficiency of the instrumentalities of commerce and of the human agencies engaged therein,

[28] 34 Stat. at L. 1415.
[29] 221 U. S. 612.
[30] 222 U. S. 370.

it would seem that there is almost no limit to the regulatory statutes it may enact to secure this end.

One of the most important laws enacted by Congress, under the power given it to control commerce among the states, is the Employers' Liability Act[31] of April 22, 1908, which was upheld in Mondou *v.* New York, New Hampshire & Hartford R. Co.[32] A prior attempt to legislate with reference to the liability of employers was held unconstitutional in Howard *v.* Illinois Central R. Co.,[33] because it was not in terms restricted to employees engaged in interstate commerce. While the recent statute is so limited, the decisions of the Supreme Court as to what constitutes interstate commerce have the practical effect of making nearly all railroad employees, except, perhaps, those whose duties are wholly disconnected with the business of transportation, subject to its terms. Thus, it has recently been held in the case of Pedersen *v.* Delaware, Lackawanna & Western R. Co.[34] that an employee of an interstate railway, killed while carrying a sack of bolts and rivets to be used in repairing a bridge which was regularly in use in both interstate and intrastate commerce, was employed in interstate commerce within the meaning of this act. As substantially all railroads are now engaged in interstate commerce, and as their road-way and equipment are necessarily used therein, their section foremen, bridge laborers, etc., are within the terms of the federal act.

In the Pedersen case it was also held that instances where the causal negligence is that of a fellow servant engaged in intrastate commerce are embraced by the provisions of the act in question, if the person injured is engaged in interstate commerce. It has been pointed out, in discussing the Safety Appliance Act, that nearly all trains are interstate trains and that, therefore, nearly all engine men, conductors, flagmen, and train operatives are interstate employees.

There have been many decisions construing this act, which it is beyond the scope of this article to review. It may be said, however, that it makes many and radical changes in the rules

[31] 35 Stat. at L. 65.
[32] 223 U. S. 1.
[33] 207 U. S. 463.
[34] 229 U. S. 146.

of liability which have heretofore been imposed by the states. The fellow servant rule is greatly modified, contributory negligence is no longer a bar to recovery, but the amount is to be fixed with reference to the degree of negligence attributable to the injured employee. Assumption of risk is also dealt with, and the persons in whose names suits may be prosecuted are prescribed. In the Mondou case it was held that the laws of the several states, in so far as they cover the same field, are superseded by the enactment of the Employers' Liability Act, and it follows that the rights of injured railroad employees who are engaged in interstate commerce, and, as has been said, nearly all such employees are so engaged, are determined by the federal act.

This once more illustrates the far-reaching consequence and effect of Congressional legislation under the commerce clause. Nearly all of the states have had statutes bearing upon the liability of railroads for injuries received by their employees, and the state courts have delivered numerous opinions construing them. All of these statutes and decisions are largely set aside and nullified by this federal legislation. By its terms the state courts still retain jurisdiction of suits based thereon, but it would, of course, have been wholly within the power of Congress to give the federal courts exclusive jurisdiction. Indeed, one of the grounds upon which the constitutionality of the act was attacked was that it confers jurisdiction on the state courts. As it is, whenever a state court is called upon to construe the act a federal question is presented and the case can ultimately be taken on appeal to the Supreme Court of the United States.[35]

Congress having thus prescribed rules governing the responsibility of interstate carriers by rail for injuries to their employees, it may reasonably be expected that it will eventually regulate their liability for injuries to their interstate passengers. Indeed, it would naturally follow that every species of liability for injuries done by a carrier while engaged in interstate commerce be covered by federal legislation, including even injuries to trespassers and licensees. This would give to the national

[35] St. Louis, etc., R. Co. *v.* McWhirter, 229 U. S. 265.

government control of the greater part of the personal injury litigation, which is so extensive as to have been said to include about one-half of all of the cases now pending in the state courts.

There is now pending before Congress, with many indications of its passage, a measure fixing an automatic scale of compensation for injuries to employees engaged in interstate commerce, even though they were not caused by their employer's negligence. Similar rules of liability obtain in nearly all of the European countries, and it is, no doubt, only a question of time before the national and state governments both adopt this principle.

Another most important piece of legislation is the Food and Drugs Act [36] of June 30, 1906, which has for its purpose, among other things, the exclusion from interstate commerce of all adulterated or impure articles of food, and contains important and far-reaching regulations as to the proper branding or naming of articles, etc. The power of the national government under the commerce clause is thus invoked to protect the health of the people, and that it is lawfully done was expressly held in Hipolite Egg Co. *v.* United States.[37] It was again announced that no trading can be carried on between the states to which the power of Congress does not extend, and that this power is complete in itself, subject to no limitations except those found in the Constitution, and this without regard to whether or not the power be used to control commerce directly or indirectly to accomplish some other end.

As every manufacturing or trading organization of any importance must engage in interstate commerce, if the national government has the power to exclude their products therefrom, it can practically prevent their doing business. Having prohibited the transportation of adulterated or impure products, it, of course, devolves upon the national government to determine what products are in fact impure or adulterated; and many bitter controversies have already arisen as the result of the findings of its chemists and others engaged in the performance of this duty.

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[36] 34 Stat. at L. 758.

[37] 220 U. S. 45.

While the validity of this law is based upon the fact that it is aimed at objects which are deleterious and harmful and, therefore, not proper subjects of commerce, it is far from certain that Congress has not the power arbitrarily to exclude from interstate commerce any article whatsoever.

The Supreme Court, in construing the so-called Commodities Clause of the Hepburn Bill,[38] held that Congress had the power to prohibit an interstate carrier from transporting in interstate commerce articles or commodities "manufactured, mined or produced by it or under its authority, or which it might own, in whole or in part, or in which it might have any interest, direct or indirect," and took occasion to say:

"The question then arises, whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce. That it was, we think, is apparent, and if reference to authority to so demonstrate is necessary, it is afforded by a consideration of the ruling in the New York, N. H. & H. R. Co. case, to which we have previously referred. We do not say this upon the assumption that, by the grant of power to regulate commerce, the authority of the government of the United States has been unduly limited on the one hand and inordinately extended on the other, nor do we rest it upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the states of lawful commodities, or to destroy the governmental power of the states as to subjects within their jurisdiction, however remotely and indirectly the exercise of such powers may touch interstate commerce. On the contrary, putting these considerations entirely out of mind, the conclusion just previously stated rests upon what we deem to be the obvious result of the statute as we have interpreted it; that it merely and unequivocally is confined to a regulation which Congress had the power to adopt and to which all pre-existing rights of the railroad companies were subordinated."

There was thus reserved for future consideration the question whether there exists the unlimited and unrestricted power

[38] United States *v.* Delaware & Hudson Co. et al., 213 U. S. 366.

to exclude articles from interstate commerce without regard to their nature.

Not only has Congress used its power over interstate commerce to protect the public health, but it has resorted to it to accomplish various other ends only remotely connected with commerce. It has thus legislated to protect the public morals in the act which prohibits the carrying of obscene literature, etc., from one state to another [39] and in the so-called "White Slave Act" [40] of June 25, 1910, which was pronounced valid in Hoke *v.* United States.[41]

The statute which prohibits the transportation of lottery tickets from one state to another [42] was intended to discourage gambling.

The act [43] of June 29, 1906, prevents cruelty to animals during their interstate transportation by limiting the time of their confinement in cars and requiring their periodical unloading for rest, water and feeding.

Congress has lately even used its power over commerce to regulate, and in some instances to prohibit, the killing of migratory birds, and we thus have a national game law. Though this statute has not yet been judicially construed or applied, it follows from the principles so often enunciated, that it will be held exclusive and will supersede all state game laws in so far as they apply to the birds and water fowls comprehended within the terms of the federal statute.

Other interesting instances of recent Congressional legislation under the Commerce Clause might be given. For instance, the national government has, in the recent statute making it a crime to break the seals on an interstate car, committed itself to the policy of protecting from theft property while being transported from one state to another. Its power to safe-guard the subjects and instrumentalities of interstate commerce by injunction or physical force was long ago upheld in the Debbs case.[44]

It has recently undertaken the regulation of express and

[39] 29 Stat. at L. 512.
[40] 36 Stat. at L. 825.
[41] 227 U. S. 308.
[42] 28 Stat. at L. 963.
[43] 34 Stat. at L. 607.
[44] 158 U. S. 564.

sleeping car rates and, no doubt, sooner or later will extend its control to telephone and telegraph companies.

While, the national power over commerce between the states, the direct and affirmative exercise of which is of such recent origin, has already been so used as profoundly to affect modern governmental theories, scarcely a beginning has been made. It is certain that in the process of evolution, which is fast bringing about a highly centralized national government with the strength and the power to control and regulate the manifold and complex activities of modern civilization, the commerce clause of the constitution will play a most important part.

"Commerce," said Chief Justice Marshall in Gibbons *v.* Ogden, "undoubtedly is traffic, but it is something more, it is intercourse." The power, therefore, to regulate, not merely traffic but, intercourse among the states exists, and it is not surprising that it has been used to protect the public purse, the public morals, the public health, to conserve the national resources, and as a means for sociological experimentation.

"Constitutional provisions do not change, but their operation extends to new matters, and the modes of business and the habits of life of the people vary with each succeeding generation. * * * Just so it is with the grant to a national government of power over interstate commerce. The constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop." [45]

O. W. Catchings.

VICKSBURG, MISS.

[45] Pensacola Telegraph Co. *v.* Western Telegraph Co., 96 U. S. 1.